IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 8, 2008

STATE OF TENNESSEE v. JUAN LA SEAN PERRY

Direct Appeal from the Circuit Court for Maury County
No. 13103 Robert Holloway, Judge

No. M2007-00903-CCA-R3-CD - Filed April 28, 2008

The defendant, Juan La Sean Perry, was convicted by jury of second degree murder. Thereafter, the defendant received a sentence of twenty-five years. On appeal, the defendant presents the following issues for review: (1) whether the trial court erred in denying the defendant's motion to suppress the handgun taken from the defendant as a result of a traffic stop; and (2) whether the trial court erred in failing to find any mitigating factors when imposing the sentence. After a thorough review of the record, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and ALAN E. GLENN, JJ., joined.

Gary Howell, Mt. Pleasant, Tennessee, for the appellant, Juan La Sean Perry.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Michael Bottoms, District Attorney General; and Dan Runde, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

The following is a summary of the pertinent evidence presented at trial: Joey Williams, the victim, was shot and killed on April 29, 2002. Robert Dawson, the victim's cousin, testified that he met with the victim around 10:00 p.m. on April 29, 2002. The victim told Dawson that he was going over to the Hunter Hill Apartments where some men were supposed to meet and fight. In a separate vehicle, Dawson followed the victim to the apartments. Upon arrival, the victim pulled up beside a maroon Chevrolet Caprice and stopped for a minute. The victim then drove his truck away fast with the Caprice giving chase. Dawson heard gunshots and saw someone firing a gun outside the window on the passenger-side of the Caprice. Dawson turned his car around and drove after the victim. Dawson saw that the victim's truck had stopped near a fire hydrant. Dawson went over to

the truck and saw a bullet hole in the driver's-side window. Dawson opened the door of the truck and saw the victim slumped over the steering wheel. Dawson found a .380 pistol on the floor of the truck. He then went looking for the Caprice but did not find it. The next day, Dawson turned the .380 pistol over to the police.

Calvin Copeland testified that he had been riding around in a maroon Caprice with the defendant and Kinard Perry, the defendant's cousin, on the day of the shooting. Copeland said he sat in the backseat of the Caprice and the defendant sat in the front passenger seat. The three men were riding around, smoking marijuana, and drinking alcohol. According to Copeland, Kinard Perry was angry at a man named Tye Brewster. Around 10:00 p.m., Kinard Perry received a phone call that angered him and led him to look for Brewster at the Hunter Hill Apartments. At the apartments, Copeland asked a man named Chavez Whitaker if he had seen Brewster. Whitaker told them he had seen Brewster with the victim earlier that day.

Copeland testified that shortly thereafter, the victim pulled up behind the Caprice in a blue truck and began to "buck" like he was fixing to hit the Caprice. Copeland explained that "bucking" meant that the victim was stepping on the gas pedal and the brake pedal at the same time. At this time, he heard the defendant say, "you don't shoot at my cousin," referring to Kinard Perry. Copeland then saw the defendant shoot at the victim as he sped away in his truck. Agitated, the defendant told his cousin, "you just gonna sit there and let these motherf**ckers shoot at your car and break into your house and steal your dope!" In response, Kinard Perry put his Caprice into gear and took off after the victim. While chasing the victim, Kinard Perry shot at the victim about three times and the defendant shot at the victim about four times. After the defendant fired a shot, the victim's truck suddenly stopped. While driving by the truck, Copeland saw that the victim was holding onto the steering wheel and "flopping like a dead fish." Seeing the victim, Copeland exclaimed, "Hell, no." In response, the defendant told him, "Chill out. I do this type of stuff all the time."

Police Officer Tony Metcaff testified that he stopped a vehicle in which the defendant was a passenger on May 7, 2002. Due to various circumstances surrounding the stop, the defendant was subjected to a pat-down search wherein a .380 pistol was found tucked in his waistband. Agent Steve Scott testified that he worked for the Tennessee Bureau of Investigation and was an expert in ballistics and firearms identification. Agent Scott testified that the bullet casings found at the crime scene and the bullet recovered from the victim's body were not fired from the victim's gun but were fired from a gun similar to the gun found on the defendant's person. Doctor Feng Li, a forensic pathologist, testified that he conducted the autopsy of the victim and determined that the victim died from a gunshot wound to the head.

Charles Johnston testified that he had been the defendant's cell mate for a couple of days in January 2005. Inmate Johnston recalled that the defendant told him that he and his cousin, Kinard Perry, and a man named Copeland were riding around drinking beer and smoking some marijuana. According to the defendant, his cousin received a phone call and was told that a man named Tye Breckinridge had broken into his trailer and had stolen some dope. The defendant then told Inmate Johnston about the events that took place which resulted in the death of the victim. The defendant indicated that he shot the victim by saying, "I smoked that bitch."

After a three-day trial, the jury found the defendant guilty of second degree murder.

ANALYSIS

I. Motion to Suppress

In the instant appeal, the defendant first challenges the trial court's denial of his motion to suppress the handgun taken from him as a result of a traffic stop.

At the suppression hearing, Police Officer Tony Metcaff of the Fayetteville Police Department testified that he stopped a vehicle for speeding on May 7, 2002, around 3:20 p.m. The vehicle had three occupants, one of which was the defendant who was riding as a passenger in the back seat. Upon stopping the vehicle, Officer Metcaff had the driver step out of the vehicle. Officer Metcaff asked the driver for his license, registration, and proof of insurance. Officer Metcaff also asked the driver for his name and the names of his passengers. The driver identified himself as Christopher White and his passengers as Leroy Myles and Juan La Sean Perry. Officer Metcaff thought that White was acting funny and did not appear to want to talk to him or answer his questions. Officer Metcaff then asked the two passengers their names. The passenger sitting in the front seat identified himself as Leroy Brown, which was inconsistent with the name White had given. Officer Metcaff then asked Myles and the defendant for identification. Myles said he had no identification on him, but the defendant said he had identification and handed it to Officer Metcaff.

Officer Metcaff testified that he asked White if there were any drugs or alcohol in the vehicle. White said, "no" and gave his consent to search the vehicle. Officer Metcaff said that he also ran a warrant check on White, Myles, and the defendant. "Nothing came back on any of the [occupants], but a detective from the sheriff's office came over the radio and said that [the defendant] was wanted for questioning in another county." Officer Metcaff recalled that he was advised that the defendant was wanted for questioning about a possible homicide. Subsequently, Officer Metcaff asked each passenger to exit the vehicle so he could talk to them. Officer Metcaff asked each passenger if he could conduct a pat-down search for his own safety. Both passengers said "it would be okay." As he conducted a pat-down search of Myles, a joint fell out of Myles' baseball cap. While conducting the pat-down search of the defendant's person, Officer Metcaff discovered a loaded .380 semi-automatic pistol in the defendant's waistband. The defendant was then arrested for unlawfully carrying a weapon.

Upon further examination, Officer Metcaff denied patting down the defendant before hearing the dispatch regarding the defendant's possible involvement in a homicide. Officer Metcaff acknowledged that he did not always ask the names of passengers when citing a driver for speeding. He also acknowledged that he did not always check for outstanding warrants after stopping someone for speeding. Officer Metcaff further acknowledged that his search for outstanding warrants came up negative. However, Officer Metcaff reiterated that he heard the dispatch while he was checking for warrants. Officer Metcaff admitted that he patted down Leroy Myles before patting down the defendant even though he heard dispatch. He also admitted that at the time of the stop, nobody in the vehicle appeared dangerous.

Tommy Gotz, a police investigator with the Mount Pleasant Police Department, testified that he had issued a "Be On The Lookout" (BOLO) alert for the defendant in connection with the homicide of Joey Williams prior to the defendant's arrest.

Following the hearing, the trial court denied the defendant's motion to suppress. The court found that the initial stop by Officer Metcaff was legal. The court then found that Officer Metcaff's actions in asking the passengers their names after questioning the driver about the passenger's names were minimally intrusive and not unconstitutional. The court further found that Officer Metcaff had reason to be concerned about his safety given that Myles had lied about his name; and therefore, the pat-down search of all three of the vehicle's occupants was justified.

When a decision on a motion to suppress is challenged, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). However, appellate review of a trial court's conclusions of law and application of law to facts on a motion to suppress evidence is a de novo review. *See State v. Nicholson*, 188 S.W.3d 649, 656 (Tenn. 2006); *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001).

Both the state and federal constitutions protect individuals from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. Therefore, a search or seizure conducted without a warrant is presumed unreasonable and any evidence discovered as a result of such a search is subject to suppression. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). However, the evidence will not be suppressed if the state proves that the warrantless search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000) (quoting *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

One such exception is a brief investigatory stop by a law enforcement officer if the officer has a reasonable suspicion, based upon specific and articulable facts, that a person has either committed a criminal offense or is about to commit a criminal offense. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Binette*, 33 S.W.3d at 218. This narrow exception has been extended to the investigatory stop of vehicles. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992). In evaluating whether a police officer has a reasonable suspicion, supported by specific and articulable facts, a court must consider the totality of the circumstances. *Binette*, 33 S.W.3d at 218. Those circumstances may include the personal observations of the police officer, information obtained from other officers and agencies, information obtained from citizens, and the pattern of operation of certain offenders. *Watkins*, 827 S.W.2d at 294. Additionally, the court must consider any rational inferences and deductions that a trained officer may draw from those circumstances. *Id.* Objective standards apply rather than the subjective beliefs of the officers making the stop. *State v. Norwood*, 938 S.W.2d 23, 25 (Tenn. Crim. App. 1996).

A police officer's actions after conducting an investigatory stop must reasonably relate to the circumstances which justified the stop in the first place. *See Terry*, 392 U.S. at 20. The detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Moreover, the officer should employ the least intrusive means reasonably available to investigate his or her suspicions in a short period of time. *Id.* In determining the reasonableness of the detention, the proper inquiry is whether during the detention, the officer diligently pursued a means of investigation that was likely to confirm or dispel his or her suspicions quickly. *United States v. Sharpe*, 470 U.S. 675, 686 (1985). "If the time, manner or scope of the investigation exceeds the proper parameters," a constitutionally permissible stop may be transformed into an impermissible stop. *State v. Troxell*, 78 S.W.3d 866, 871 (Tenn. 2002). If the officer develops a reasonable suspicion that the occupant is engaged in other criminal activity during a valid stop, further detention is justified. *State v. Branden Haney and Lawrence Davis*, No. E2002-00559-CCA-R3-CD, 2003 WL 22169708, at *5 (Tenn. Crim. App., at Knoxville, Sept. 19, 2003). The reviewing court considers the totality of the circumstances to determine whether police officers had reasonable suspicion to expand the scope of a traffic stop. *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

The defendant does not challenge the propriety of the initial traffic stop of the vehicle in which he was a passenger. Rather, the defendant argues that Officer Metcaff violated his constitutional rights by asking the driver of the speeding vehicle the names of the vehicle's passengers, and then asking the passengers their names for comparison.

To support his argument, the defendant cites *Johnson v. State*, 601 S.W.2d 326 (Tenn. Crim. App. 1980). In *Johnson*, a police officer stopped a motor vehicle for a misdemeanor traffic offense. The driver voluntarily exited the vehicle and spoke with the police officer near the patrol car. *Id*. at 327. The officer then approached the stopped vehicle to "check the passengers." *Id*. The appellate court in *Johnson* found that the police officer provided no explanation as to why he went over to vehicle to check out the passengers other than curiosity. *Id*. at 329. The court stated the following: "The narrow question we face is whether a police officer, after having stopped a motor vehicle for a traffic violation, has the right to 'check the passengers' who happen to be in the vehicle, nothing else appearing amiss. We hold that officers have no such right." *Id*. at 328.

Turning to the facts of this case, it is clear that Officer Metcaff had reasonable justification to stop the vehicle as the driver of the vehicle was speeding. A police officer may make a traffic stop if he has probable cause or reasonable suspicion to believe a traffic violation has occurred. *State v. Vineyard*, 958 S.W.2d 730, 734 (Tenn. 1997). Additionally, a traffic stop subjects the passengers, as well as the driver, to a seizure. *Brendlin v. California*, --- U.S. ----, 127 S.Ct. 2400, 2407 (2007). However, the issue presented in this case involves the remainder of the encounter; that is, whether Officer Metcaff's actions during the course of the stop were reasonably related in scope to the circumstances that initially justified the stop.

It is our view that the facts set forth in the *Johnson* decision are distinguishable from the facts in the instant case. Simply put, unlike the police officer in *Johnson*, Officer Metcaff provided a reasonable explanation as to why he extended the scope of the traffic stop. Officer Metcaff stated

that the driver was acting funny and appeared to be evading his questions prompting him to ask the driver the passenger's names, and ask the passengers their names. One of the passengers gave a name which differed from the name the driver had given. This inconsistency aroused Officer Metcaff's suspicion that something was amiss and so he decided to conduct a warrants check. Also, we note that the United States Supreme Court has held that a police officer does not need reasonable suspicion to ask a citizen being lawfully detained for the citizen's name. *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (noting that mere police questioning does not constitute a seizure); *see also Daniel*, 12 S.W.3d at 425. Therefore, considering the facts of this case, we fail to see how Officer Metcaff's limited inquiry into the identification of the passengers while in the process of citing the driver for speeding rendered the traffic stop unreasonable.

Furthermore, Officer Metcaff was justified in conducting the pat-down search of the defendant. Another well-recognized exception to the warrant requirement is a voluntary and knowing consent to search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). The consent must be "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." *State v. Simpson*, 968 S.W.2d 776, 784 (Tenn. 1998) (quoting *State v. Brown*, 836 S.W.2d 530, 547 (Tenn. 1992)). The voluntariness of a citizen's consent to search is a question of fact to be determined based on the totality of the circumstances. *Schneckloth*, 412 U.S. at 249. At the suppression hearing, Officer Metcaff testified that the driver gave him consent to search the vehicle. After receiving consent to search the vehicle, Officer Metcaff asked the driver and the passengers if he could pat them down for his safety. They all agreed. Accordingly, the totality of the circumstances shows that the defendant consented to the pat-down search of his person. Assuming *arguendo*, that the defendant did not voluntarily consent to the pat-down search, we nevertheless conclude that the totality of the circumstances demonstrates that Officer Metcaff had reasonable suspicion to justify a pat-down search of the defendant. As indicated, during the traffic stop, Officer Metcaff learned via police dispatch that the defendant was wanted for questioning regarding a recent homicide. Given this information, Officer Metcaff had reason to believe that the defendant may have been armed or dangerous, and therefore, he was justified in engaging in a limited pat-down search of the defendant. *See Terry*, 392 U.S. at 23-26 (limited pat-down search permissible upon a showing that such action is justified to protect the officer); *see also Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (for the purpose of officer safety, both the driver and passenger may be ordered out of a vehicle in the course of a routine traffic stop). Accordingly, the trial court did not abuse its discretion denying the defendant's motion to suppress the handgun obtained after a pat-down search of the defendant's person. The defendant is not entitled to relief on this issue.

II. Mitigating Factors

The defendant next argues that the trial court erred in sentencing by failing to find mitigating factors (6) and (12): that he lacked substantial judgment in committing the offense, and acted under duress or under the domination of another person. Tenn. Code Ann. 40-35-113(6), (12) (2006).

When a defendant challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401. This presumption of correctness is conditioned upon the

affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001); *see also* Tenn. Code Ann. § 40-35-210(f).

In conducting a de novo review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The record reflects that the defendant was convicted of second degree murder, a Class A felony, and thus subject to a sentencing range of fifteen to twenty-five years as a standard offender. *See* Tenn. Code Ann. § 40-35-112(a)(1). When sentencing the defendant to twenty-five years, the trial court applied the following enhancement factors: the defendant had a substantial history of criminal convictions or criminal behavior; the defendant employed a firearm during the commission of the offense; and the defendant had no hesitation about committing the crime when the risk to human life was high. *See* Tenn. Code Ann. § 40-35-114(2), (9), and (10). Additionally, the record reflects that the court considered all requested mitigating factors and supported its reasoning for denying application of them. Addressing mitigating factors (6) and (12), the court stated the following:

> Next mitigating factor is Number 6. Defendant, because of youth or old age, lacks substantial judgment in committing the offense.
>
> At the time of this offense, you were 20 years of age, which is young. But, at the time of this offense, you had . . . committed numerous, other serious criminal and violent offenses. You were experienced in criminal offenses at this time. So I find that your youth is not a factor, or a mitigating factor in the commission of this murder.
>
> The next one . . . raised [is] Number 12. That you acted under duress, or under the domination of another person.
>
> I don't find, from the proof, that you were dominated by either Mr. Copeland, or your cousin, Mr. Perry. You were with them. You were in the passenger seat. Based on the testimony I heard, you were firing a pistol. . . . [I]t appears that you

were the one that was most angry at that time, that [you were] the person that really got violent in this situation. So I find factor Number 12, not to be applicable.

Contrary to the defendant's assertion on appeal, it is readily apparent from the record that the court considered the mitigating factors recommended by the defendant. Accordingly, we find no error in the trial court's refusal to mitigate the defendant's sentence based on the aforementioned mitigating factors. The issue is without merit.

CONCLUSION

For the reasons stated herein, the judgment of the trial court is affirmed.

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J.C. McLIN, JUDGE